In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 721

EUGENE S. CONLIN, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 1a–7a) is reported at 146 F. Supp. 833.

JURISDICTION

The judgment of the Court of Claims was entered on December 5, 1956. The petition for a writ of certiorari was filed on January 29, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether a claim for disability retirement pay, filed in 1956 by a non-regular officer who was released from active duty in 1946 without entitlement

to such pay, is barred by the six-year statute of limitations which governs the Court of Claims.

STATUTE INVOLVED

28 U. S. C. 2501 provides in pertinent part:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed * * * within six years after such claim first accrues.

STATEMENT

Petitioner, a former Reserve Corps officer in the Army of the United States, instituted this proceeding in the Court of Claims on May 29, 1956, to recover disability retirement pay. On December 5, 1956, the court sustained the Government's motion to dismiss the case on the ground that the claim was barred by the six-year statute of limitations. 28 U. S. C. 2501, *supra*. For the purpose of its decision, the court assumed the following essential facts (Pet. App. 1a ff.): On May 1, 1946, after an operation, petitioner, then on active duty, appeared before an Army Retiring Board [1] which found petitioner not permanently incapacitated for active service. On August 27, 1946, petitioner reverted to inactive duty status without disability retirement pay.

[1] Army Retiring Boards, at the time here material, were convened pursuant to R. S. 1246, 10 U. S. C. (1946 Ed.) 961, and were charged with the function of determining whether an officer, appearing before the Board, was capable of discharging the duties of his office. R. S. 1248, 1249, 10 U. S. C. (1946 Ed.) 963, 964. Access to these Boards for non-regular officers was created by the Act of April 3, 1939, 53 Stat. 557, 10 U. S. C. 456.

In 1947 and again in 1949, petitioner again appeared before Army Retiring Boards. On both occasions, the Boards declined to recommend that petitioner be granted disability retirement pay. Thereafter, in 1955 and 1956, petitioner sought further consideration by the Army of his claim to disability retirement pay, including consideration by the Army Board for the Correction of Military Records.[2]

In the instant case, petitioner sought a recovery of $237.20 per month from August 27, 1946, the date on which he was first released to inactive duty status without entitlement to disability retirement pay.

ARGUMENT

1. This Court has recently declined to review a decision of the Court of Claims to the effect that a cause of action for disability retirement pay, such as that here involved, accrues at the latest when the officer claimant is released without entitlement to such pay by the Secretary after recommendation by the retiring board.[3] *Barker* v. *United States*, No. 471, this Term, certiorari denied, December 3, 1956, 352 U. S. 935, petition for rehearing denied, January 14, 1957. The *Barker* decision by the Court of Claims (140 F. Supp. 415) was plainly correct and squarely controls the instant case. And *Barker* did no more

[2] Boards for the Correction of Military Records were created by Section 207 of the Act of August 2, 1946, 60 Stat. 837, as amended by the Act of October 25, 1951, 65 Stat. 655 (5 U. S. C. 191a).

[3] As pointed out by the majority opinion below, there is no contention here that the retiring boards' proceedings were not approved by the Secretary of the Army (Pet. App. 3a).

than apply the controlling principle, embodied in 28 U. S. C. 2501 and recognized by this Court as early as *Kendall* v. *United States,* 107 U. S. 123, and as recently as *Soriano* v. *United States,* No. 49, this Term, that Congress permits suits in the Court of Claims only within six years after the cause of action *first* accrues. No exceptions to this jurisdictional limitation are allowed except those specifically provided by Congress, not here involved, to cover instances of legal disability during the limitation period. Here, and in similar cases such as *Barker,* the cause of action first accrued at the time of discharge from service without entitlement to pay. The six-year limitations period began to run at that point, specifically, in August. 1946. Accordingly, the complaint filed on May 29, 1956, was plainly out of time.

Efforts are continually being made in Court of Claims litigation to avoid or toll the time limitation imposed by Congress on that court's jurisdiction to entertain suit. For example, it is contended that the privilege accorded military personnel, after discharge without entitlement to pay, of requesting further review within the permissive Army system gives rise to some sort of new cause of action which suffices to bring into the Court of Claims the incidents of the original discharge. In decisions rejecting such contentions (*Barker* v. *United States, supra; Rosnick* v. *United States,* 132 C. Cls. 1, rehearing denied, 132 C. Cls. 6; *Odell* v. *United States,* 134 C. Cls. 643, rehearing denied 134 C. Cls. 634; see Government's Brief in Opposition in No. 471, this Term, pp. 6–8), the court below has recognized that acceptance of this position would

effectively destroy the limitations period imposed by Congress.[4]

The contention advanced in the instant case is even more extreme. Petitioner contends that, after he has been denied disability retirement pay and discharged without entitlement, a new cause of action arises in him at each point in time at which periodic payments would have been due had he been initially determined to be entitled to such pay.[5] This position would, of course, destroy—or, at the least, drastically curtail—the statute of limitations entirely in this kind of case. Here, and in related decisions, a majority of the court below has consistently refused to accept the so-called continuing claim theory. *MacFarlane* v. *United States*, 140 F. Supp. 420; *Levadi* v. *United States*, 146

[4] In proper cases, review may be sought before a Disability Review Board at any time within 15 years of the final action following retiring board proceedings. 38 U. S. C. 693 (i). Again, application to the Board for the Correction of Military Records may be made within three years after date of discovery of the alleged error or injustice or ten years after date of enactment of the statute creating that Board. 5 U. S. C. 191 (a). Recognizing these time factors, the Court of Claims said, in *Odell* v. *United States*, 134 C. Cls. at p. 645: "* * * But we think that Congress did not, by this provision, intend that cases might be brought in this court 21 years after the pertinent facts had occurred."

[5] This is the so-called "continuing claim" theory which is properly applicable only in pay cases which turn on the interpretation of statute or regulation. See *e. g.*, *Gordon* v. *United States*, 134 C. Cls. 840; *Tanner* v. *United States*, 129 U. S. 792, certiorari denied, 350 U. S. 842; *Commings* v. *United States*, 89 C. Cls., 498. The theory has no applicability where, as here, the right to recovery necessarily depends on the factual determination of a board or agency. When the decision of the board or agency is made, the cause of action first accrues. It could not be otherwise, else the factual determination on which the cause of action pivots could be reviewed indefinitely throughout the future.

F. Supp. 455, pending on petition for a writ of certiorari, No. 746, this Term; *Odell* v. *United States*, 134 C. Cls. 634. As the Court of Claims said in the *Odell* case (*supra* at p. 638):

> We know of no case in which this court, or any other court, has held that plaintiff may bring an action more than six years after the determination of his rights by a board or agency given jurisdiction to do so, and this is so even though plaintiff seeks to recover only those payments that would have accrued within six years of the filing of his petition, if the board's decision had been in his favor.

2. Petitioner places considerable emphasis on the decision of the Court of Claims in *Furlong* v. *United States*,[6] decided on the same day as the instant case, in which a claim for disability retirement pay filed in 1954 by an officer separated without entitlement to such pay in 1946 was held not to be time barred. A conflict is asserted between that decision and the instant case. But, on close analysis, no conflict need be found between *Furlong* and this case, insofar as the "continuing claim" theory is concerned.

Petitioner relies entirely on the opinion of Judges Littleton and Madden in the *Furlong* case. The view expressed by those two judges in that case, accepting the continuing claim theory, is, of course, the same as that filed by them as dissenters in the instant case.

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[6] 146 F. Supp. 823. The petition for reconsideration in *Barker*, denied by this Court on January 14, 1957, also directed attention to the *Furlong* decision, as well as to the decision in the instant case and in *Levadi* v. *United States*, *supra*, No. 746, this Term.

The majority in *Furlong* consisted of these two judges together with Chief Judge Jones and Judge Whitaker, the latter two expressing entirely different reasons for the result reached. They held, for reasons which, in our view, are erroneous, that the single cause of action accrued at some point later than 1946 because the claimant there did not appear before a retiring board until 1948. See Pet. App. 3a–15a.

The Government is of the opinion that the result reached in the *Furlong* case is incorrect. A motion for reconsideration in that case is presently pending before the Court of Claims. However, the case does not constitute a holding contrary to the instant case on the continuing claim theory since two of the four judges composing the majority of the court decided the case on the basis of special considerations not present here.

3. We have assumed, for the purpose of discussing the statute of limitations, that the Court of Claims properly entertained this military pay case. For the reasons set forth in our brief in opposition in *Barker*, this Term, No. 471, pp. 9–11, we submit that the Court of Claims is entirely without jurisdiction in this class of case.

CONCLUSION

For the reasons set forth above, we respectfully submit that the petition for a writ of certiorari should be denied.

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FEBRUARY 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957